Shutting the Gate: Gay Civil Rights in the Supreme Court of Canada

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Introduction

In the 1970s only two provincial human rights cases reached the Supreme Court of Canada: *Bell* v. *Ontario Human Rights Commission*[1] and *Gay Alliance Toward Equality* v. *The Vancouver Sun*.[2] Observers who had hoped the Court would redeem itself and reverse the narrow interpretation given the *Canadian Bill of Rights*[3] since *R.* v. *Drybones*[4] were disappointed with both decisions. Instead of providing guidance to provincial boards and courts grappling with the issues arising from recent civil rights legislation, the Court summarily dismissed the complaints of discrimination presented to it.

In *Bell,* a unanimous Court confirmed the granting of a writ of prohibition against a board of inquiry set up under *The Ontario Human Rights Code*.[5] It chose to adopt a forced and narrow interpretation of the words "self-contained dwelling unit" that appeared in the statute,[6] thus denying the board the opportunity of entertaining the issue by hastily characterizing it as jurisdictional. Recent decisions issued by provincial appellate courts and the Supreme Court of Canada have, however, tended to

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[1] [1971] S.C.R. 756, 18 D.L.R. (3d) 1 *per* Martland J. See also Côté, *La Belle affaire que l'affaire Bell* (1972) 7 R.J.T. 403; Hunter, *Human Rights in Canada: Its Origin, Development and Interpretation* (1976) 15 U.W.O.L. Rev. 21.

[2] [1979] 2 S.C.R. 435, 97 D.L.R. (3d) 577, 10 B.C.L.R. 257, 27 N.R. 117 [hereinafter *GATE,* cited to S.C.R.].

[3] R.S.C. 1970, App. III.

[4] [1970] S.C.R. 282. The relevant cases on the *Canadian Bill of Rights* after *Drybones* are: *Attorney-General of Canada* v. *Canard* [1976] 1 S.C.R. 170; *Attorney-General of Canada* v. *Lavell* [1974] S.C.R. 1349; *R.* v. *Smythe* [1971] S.C.R. 680; *R.* v. *Burnshine* [1975] 1 S.C.R. 693; *MacKay* v. *The Queen* (1980) 114 D.L.R. (3d) 393 (S.C.C.). See also W. Tarnopolsky, *The Canadian Bill of Rights,* 2d rev. ed. (1975); P. Hogg, *Constitutional Law of Canada* (1977), 431 *et seq.*

[5] R.S.O. 1970, c. 318 (as am.).

[6] S. 3 (b).

defer to administrative tribunals, allowing them greater latitude to determine the policy issues entrusted to them by the legislature.[7]

Considering that the issue of gay civil rights is still viewed by many as highly controversial,[7a] it is not surprising that courts have been wary of being thrust into the debate. Throughout the last decade, the United States Supreme Court denied *certiorari* in all gay rights cases in which review was sought.[8] Given the timorousness exhibited by its American counterpart, it is not surprising that the Supreme Court of Canada should decide to deny a gay liberation newspaper the remedies afforded by the *Human Rights Code of British Columbia*.[9]

The potential consequences of *GATE* do not, however, merely involve a setback for gay rights groups seeking to gain legal acceptance of homosexuality within Canadian society. The decision represents a dangerous precedent in the area of human rights: its effects may seriously curtail access to civil rights remedies for a broad range of persons complaining of discrimination.

I. The Factual Background

The Gay Alliance Toward Equality (G.A.T.E.) was a non-profit gay rights organization based in Vancouver.[10] On 23 October 1974 Maurice Flood, its chairperson, requested that an advertisement promoting subscriptions to its newspaper appear in The Vancouver Sun's classified advertising section.[11] The advertisement read as follows:

> Subs. to GAY TIDE, gay lib paper. $1.00 for 6 issues. 2146 Yew St., Vancouver.

The newspaper refused to publish the advertisement, stating that it "was not acceptable for publication in this newspaper".[12] Attempts to have The Sun

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[7] See, *e.g., Re CIP Products Ltd and Saskatchewan Human Rights Commission* (1978) 87 D.L.R. (3d) 609 (Sask. C.A.) and *Heustis* v. *N.B. Electric Power Commission* [1979] 2 S.C.R. 768. Judicial deference to human rights tribunals has been further emphasized by Thurlow A.C.J. (as he then was) in *Attorney-General of Canada* v. *Cumming* [1980] 2 F.C. 122 (T.D.).

[7a] *E.g., R* v. *Fraser* (1980) 20 A.R. 33, 59, *per* McDermid J.A. (dissenting).

[8] See, *e.g., Doe* v. *Commonwealth 's Attorney* 425 U.S. 901 (1976); *Singer* v. *U.S. Civil Service Commission* 97 S. Ct 725 (1977); *Ratchford* v. *Gay Lib* 98 S. Ct 1276 (1978); *Enslin* v. *Walford* 98 S. Ct 2257 (1978). Most denials were accompanied by strong dissents from those members who wished to grant review.

[9] S.B.C 1973 c. 119 (as am.); now R.S.B.C. 1979, c. 186.

[10] The group's aims were stated to be that homosexuality is a "valid and legitimate form of human sexual and emotional expression, in no way harmful to society or the individual, and completely on par with heterosexuality". Transcript of proceedings before the Board of Inquiry, 28 February 1975; direct examination of Mr Maurice Flood, Joint Record (*GATE*), 52.

[11] The facts are taken substantially from the judgment of Laskin C.J.C., *supra*, note 2, 441 *et seq.*

[12] *Ibid.*, 441-2.

reconsider the rejection failed, and a complaint was filed with the B.C. Human Rights Commission pursuant to s. 3 of the B.C. *Human Rights Code.*[13] The section read as follows:

> 3. (1) No person shall
> (a) deny to any person or class of persons any accommodation, service, or facility *customarily available to the public;* or
> (b) discriminate against any person or class of persons with respect to any accommodation, service, or facility customarily available to the public, unless *reasonable cause* exists for such denial or discrimination.
> (2) For the purposes of subsection (1),
> (a) the race, religion, colour, ancestry or place of origin of any person or class of persons shall not constitute reasonable cause; and
> (b) the sex of any person shall not constitute reasonable cause unless it relates to the maintenance of public decency.[14]

The Director of the Commission failed to settle the dispute,[15] and the case was referred to the Minister of Labour, who appointed a board of inquiry pursuant to s. 16 (1) of the B.C. *Code.*

The Sun made three arguments before the Board:

> (1) That homosexuality is offensive to public decency and that the advertisement would offend some of its subscribers;
> (2) That the Code of Advertising Standards, a Code of Advertising Ethics subscribed to by most of the daily newspapers in Canada includes the following section:
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> "Public decency — no advertisement shall be prepared, or be knowingly accepted which is vulgar, suggestive or in any way offensive to public decency."
>
> and that the advertisement in question did not conform to the standard therein set out; and
> (3) That the Appellant newspaper had a duty to protect the morals of the community.[16]

A hearing was convened on 28 February 1975[17] before a five member board. Counsel for G.A.T.E. presented both Kathleen Ruff, director of the Human Rights Branch of the Commission and Maurice Flood, a representative of G.A.T.E., as witnesses. The Sun was represented by John Toogood, its Director of Marketing and Advertising.

After hearing evidence, the Board of Inquiry unanimously held that there had been a violation of s. 3 (1) of the *Code.* It therefore ordered The Sun to make its classified advertising section available to G.A.T.E., and to refrain from committing the same or similar contraventions in the future.

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[13] R.S.B.C. 1979, c. 186.

[14] [Emphasis added.] Note that "sexual orientation" is absent from s. 3 (2) (a) of the *Code.* Section 3 (2) (b) was amended by S.B.C. 1974, c. 114, s. 6 (a), which added the words "or to the determination of premiums or benefits under contracts of insurance" after the word "decency".

[15] Pursuant to s. 15 of the B.C. *Human Rights Code.*

[16] Stated Case by the Board of Inquiry, 25 February 1976, Joint Record, 10 *et seq.* Cited by Laskin C.J.C., *supra,* note 2, 443.

[17] Joint Record (*GATE*), 30 *et seq.*

The principal finding of the Board, which became the focus of considerable argument before the appellate courts, reads as follows:

> Assessing all the evidence offered on the question of the cause or motivation behind the Appellant's refusal to publish the Respondent's advertisement, the majority of the Board of Inquiry found the inevitable conclusion to be that the real reason behind the policy was not a concern for any standard of public decency, but was, in fact, a personal bias against homosexuals and homosexuality on the part of various individuals within the management of the Appellant newspaper. Board member Dr. Dorothy Smith dissented on this point and held that there was no evidence whatsoever on which the Board could make such a finding; and that, in particular there was no evidence to rebut the Appellant's repeated statements that its policy was predicated on a desire to protect a reasonable standard of decency and good taste.[18]

The Sun appealed to the Supreme Court of British Columbia by way of stated case, pursuant to s. 18 of the *Code*.[19] Three questions were submitted for determination:

> 1. Was the Board of Inquiry correct in law in holding that pursuant to Section 3 (1) of the Human Rights Code of British Columbia that classified advertising was a service or facility customarily available to the public?
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> 2. Was the Board of Inquiry correct in law in holding that the Appellant herein denied to any person or class of persons any accommodation, service or facility customarily available to the public pursuant to Section 3 (1) of the Human Rights Code of British Columbia?
>
> 3. Was the Board of Inquiry correct in law in holding that pursuant to Section 3 (1) of the Human Rights Code of British Columbia that the Appellant herein did not have reasonable cause for the alleged discrimination?[20]

The Sun relied solely on its third submission before MacDonald J., who dismissed the appeal.[21]

The Court held that the issue of reasonable cause was "purely a question of fact",[22] completely within the Board of Inquiry's jurisdiction and outside the scope of appeal by way of stated case. In MacDonald J.'s view, The Sun was separating certain legal elements from the factual circumstances of the case and asking the court to find that, as a matter of law, they constituted reasonable cause. This represented "an invasion of the area of fact".[23]

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[18] *Ibid.*, 11. Cited by Laskin C.J.C., *supra*, note 2, 443. The dissent of Board member Dr Dorothy Smith did not affect her concurrence in the result of the majority.

[19] R.S.B.C. 1979, c. 186, s. 18 allows for an appeal on the following grounds: "An appeal lies from a decision of a board of inquiry to the Supreme Court on any (a) point or question of law or jurisprudence; or (b) finding of fact necessary to establish its jurisdiction that is manifestly incorrect...".

[20] Joint Record (*GATE*), 12. Cited by Laskin C.J.C., *supra*, note 2, 440-1.

[21] *The Vancouver Sun* v. *Gay Alliance Toward Equality*, 16 August 1976 (unreported). The Reasons for Judgment of Mr Justice MacDonald are contained in the Joint Record at 185 *et seq.*, and digested in [1976] W.W.D. 160 (B.C.S.C.).

[22] Joint Record (*GATE*), 187.

[23] *Ibid.*, 188.

Consequently, "no legal basis for interfering with the finding of fact was shown".[24]

A further appeal by The Sun to the British Columbia Court of Appeal was allowed.[25] Mr Justice Branca enunciated the startling proposition that a bias against homosexuals, if honestly held by the newspaper, constituted "reasonable cause" under s. 3 of the *Code* unless there was bad faith.[26] The rationale for his view is contained in the following passage:

> I am of opinion, that in justice, a bias motivated because of the belief of some people that the homosexual engages in unnatural practices or that their sexual practices are immoral or against religions does not make the conclusion wrong, in the sense that it is unreasonable.[27]

Robertson J.A. concurred and added that a newspaper owner's fear that publication of an advertisement promoting a gay rights group might lead to a loss of readers was enough to constitute "reasonable cause" under the *Code*.[28]

In his dissenting opinion, Seaton J.A. stated that The Sun's attack on the Board's decision centered solely on what constituted "reasonable cause". Since this was pre-eminently a question of fact, it was outside an appellate court's jurisdiction on an appeal by stated case. Seaton J.A. refused to disturb the findings of the Board on the spurious ground, advanced by the Court majority, that it had misapplied a "subjective" analysis of reasonable cause for a supposed "objective" test, *i.e.*, "honest bias".[29]

II. The Decisions of the Supreme Court of Canada

Three opinions were delivered by the Supreme Court of Canada: the majority decision by Mr Justice Martland with Ritchie, Spence, Pigeon, Beetz and Pratte JJ. concurring; and two dissenting opinions, one by Chief Justice Laskin, the other by Mr Justice Dickson, with Estey J. concurring. Comparison of the three judgments reveals that there were considerable perceptual differences among the members of the Court concerning the principal issues in the case.

In his brief majority opinion, Martland J. pointed out that the "questions of law" as stated

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[24] *Ibid.*

[25] *Re Vancouver Sun and Gay Alliance Toward Equality* (1977) 77 D.L.R. (3d) 487 (B.C.C.A.).

[26] *Ibid.*, 495.

[27] *Ibid.*, 494.

[28] *Ibid.*, 496. See also *B.C. Forest Products Ltd* v. *Foster and Ruff* (1979) 16 B.C.L.R. 203, 208 (B.C.S.C.)

[29] *Ibid.*, 499 *et seq.*

> raise a serious issue as to the extent to which the discretion of a newspaper publisher to determine what he wishes to publish in his newspaper has been curtailed by the *Human Rights Code*.[30]

He cited a decision of the United States Supreme Court in which the High Court declared a Florida statute providing equal space to a political candidate, to answer criticisms of his or her record by a newspaper, offensive of the First Amendment.[31] Similar legislation, according to Martland J., had appeared before the Canadian Supreme Court in *Reference Re Alberta Statutes*.[32] He noted that the freedom of the press is recognized by s. I (f) of the *Canadian Bill of Rights*.[33]

The opinion then set out the issue which arose from the appeal, to be "whether s. 3 of the [*Human Rights Code*] is to be construed as purporting to limit [freedom of the press]".[34] It should be recognized that no discussion of this issue had been raised in any of the B.C. Courts. Martland J. then proceeded to interpret the words "accommodation, service, or facility... customarily available to the public" in s. 3 of the *Code*. He held that "accommodation" refers to hotels, inns and motels, "service" includes restaurants, bars, taverns, service stations, public transportation and public utilities and "facility" refers to public parks and recreational facilities. These items, which do not include newspapers or their classified advertising section, are all "customarily available to the public".[35]

The learned justice found significant the fact that The Sun had reserved the right to revise, edit, classify or reject any advertisement received, and had printed this reservation daily at the head of the classified advertising section.

Martland J. went on to state that the freedom of the press to disseminate its views and ideas carried with it the corollary that a newspaper has the right to refuse to print material with which it does not agree. He mentioned that the minority opinions of Duff C.J.C., Davis and Cannon JJ. in the *Alberta Press* case "suggest that provincial legislation to compel such publication *may be* unconstitutional".[36]

In the case of the advertisement in question, the majority held that the refusal to publish it was predicated upon the content of the advertisement only, and not upon the personal characteristic of the person seeking to place that advertisement. The Board had erred in law, since s. 3 of the *Code* obligated The Sun to make a service available to anyone wishing to use it, but did

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[30] *Supra*, note 2, 453.

[31] *Miami Herald Publishing Co.* v. *Tornillo* 418 U.S. 241 (1974).

[32] [1938] S.C.R. 100, 2 D.L.R. 81; *aff'd* [1939] A.C. 117 (P.C.) [hereinafter the *Alberta Press* case, cited to S.C.R.].

[33] R.S.C. 1970, App. III.

[34] *Supra*, note 2, 454.

[35] *Ibid.*, 454-5.

[36] *Ibid.*, 455 [emphasis added].

not purport to dictate to a newspaper the nature and scope of the service, *i.e.*, what is to be printed.

Laskin C.J.C. dissented principally on the basis of administrative law considerations. He viewed The Sun's appeal by way of stated case from the B.C. Board's decision as procedurally unsound. He agreed with the B.C. Supreme Court and Seaton J.A. in the Court of Appeal that the Board's determination that no "reasonable cause" for discrimination existed was a conclusion of fact, or, at best, of mixed fact and law.[37] The Chief Justice said the flaw in the majority judgment of the Court of Appeal was that the judges had directly substituted their own notions of reasonable cause for those of the Board. This was improper, given the limited jurisdiction afforded appellate tribunals under s. 18 of the *Code*.[38]

The Chief Justice also considered The Sun's submission that its refusal was reasonable, or, at least, permissible under the *Code*, as it was not based on the characteristics of the member of the public seeking its services. The Chief Justice viewed this argument as

> a desperate one, seeking to circumvent the question of reasonable cause, which is the only question to be decided once it is determined that a service or facility customarily available to the public has been denied to a person, whatever be his attributes. The attributes or characteristics may themselves provide reasonable grounds for refusal (so long as they do not fall within s. 3 (2) of the *Human Rights Code*) and, if not, there may be transcending grounds that may afford reasonable cause... by excluding everything except a consideration of a complainant's characteristics or attributes. That flies in the face of the *Human Rights Code* and in the face of the plain words of s. 3. There is no limitation to personal characteristics or attributes.[39]

Finally, Laskin C.J.C. noted that though some reference was made to the constitutional status of the press, discussion of the issue was precluded due to the lack of proper notice to the Attorneys-General of B.C. and of Canada.

Mr Justice Dickson delivered a lengthy and scholarly opinion which thoroughly canvassed the relevant British, American and Canadian authorities dealing with the relations and responsibilities of the press to the general public. The underlying policy issues presented by the appeal were seriously and critically examined.

The dissenting justice first discussed a "unique" feature of the B.C. *Code*. While most provincial human rights codes contain an enumeration of proscribed forms of discrimination, the B.C. *Code* leaves the arena of proscribed discrimination open. Certain specified classifications are, however, automatically treated as "unreasonable", whereas others call for the more relaxed standard of "reasonable cause". The learned justice

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[37] *Ibid.*, 444.
[38] *Supra*, note 19.
[39] *Supra*, note 2, 447-8.

concluded his analysis of the B.C. *Code* by stating that the mere absence of "sexual orientation" from s. 3 is not presumptive of the rights of homosexuals under the *Code.* Rather, the question turns on what constitutes "reasonable cause" in the circumstances of each case, an analysis of which involves "objective" considerations.[40]

Dickson J. also discussed the role of newspapers in society. At common law a newspaper has full control over the contents of what it chooses to print, unfettered by legislative or constitutional constraints. In Canada and Great Britain there is no constitutional guarantee of the freedom of the press, yet the widely-cited comments of two Supreme Court justices in the *Alberta Press* case signify a general acceptance of the imperatives of a free press predicated on the need for free public discussion of all affairs which concern the public interest.[41]

American case law, with its strong First Amendment underpinning, afforded Mr Justice Dickson two more elements to be considered : (1) that American law protects "commercial" speech equally with "political" speech, for purposes of First Amendment scrutiny, and (2) that no right of free public access to the press can be constitutionally mandated. Drawing on recent American jurisprudence, the learned justice concluded that Canadian legislators and judiciary, unhampered by a strong constitutional guarantee of press freedom, are more willing to permit a certain regulation of newspapers.[42]

He then drew a distinction between editorial policy and content on the one hand, and commercial advertising on the other. For purposes of ensuring free public discussion of matters of concern, the editorial policy and

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[40] *Ibid.*, 460-1.

[41] *Ibid.*, 463-5.

[42] *Ibid.*, 462 *et seq.* Mr Justice Dickson cited Kellett, *Right of Publisher of Newspaper or Magazine, in Absence of Contractual Obligation, to Refuse Publication of Advertisement,* 18 A.L.R. 3d 1286, 1287-8. At p. 1291 of this Annotation we find the following illuminating remarks : "Although recognizing that there may come a time when the courts modify or alter the established common law rules applicable to newspapers, *or when regulations are applied by statutes,* the court in *Bloss* v. *Federated Publications, Inc.* 5 Mich. App. 94, 145 N.W. 2800 (1966), referred to the recognition by our founding fathers, in the First Amendment, of the importance of an independent press for the preservation of democratic institutions through well-informed citizens, concluded that the public interest demanded that the press remain independent, and affirmed a summary judgment in favour of a newspaper publisher charged with refusing to accept and publish advertisements for 'adult movies'" [emphasis added]. A publisher is entitled to refrain from selling advertising to those it deems undesirable : *Camp-of-the-Pines, Inc.* v. *New York Times Co.* 53 N.Y.S. 2d 475 (Sup. Ct 1945). Furthermore, in the absence of legislative regulation, the publisher is not required to publish an advertisement. It is submitted that such legislative or statutory regulation exists in B.C. by virtue of s. 3 of the *Human Rights Code, supra,* note 9 ; therefore the broad common law right of newspaper publishers and editors to refuse to publish advertisements must be circumscribed accordingly.

contents of a newspaper deserve judicial protection. Once services or facilities are provided to the public through the classified advertising section of the newspaper, the public interest demands that another goal be given priority — that of ensuring the non-discriminatory treatment of all sectors of society in the provision of a commercial service or facility "customarily available to the public". In this latter context, the demands of the *Human Rights Code* are met.

Finally, Dickson J. considered the circumstances of the case at bar. The Respondent newspaper appeared to have two policies concerning homosexuality. The editorial department did not refuse to print matter concerning homosexuals. But the advertising department was concerned not to offend its readers and refused to print anything that dealt with homosexuals or homosexuality. The B.C. Board of Inquiry had found, as a matter of fact, that the grounds advanced by The Sun did not afford it reasonable cause to refuse the advertisement in question. To overturn the Board's decision, and hold that publication of the advertisement would indeed have a major impact on its way of conducting business, would be to substitute directly new findings of fact for those found by the Board, a procedure forbidden to the superior courts by s. 18 of the *Code.*

Having concluded that The Sun's appeal to the B.C. Supreme Court and Court of Appeal was not validly taken, Mr Justice Dickson summarily dismissed several issues which formed the *ratio* of the Supreme Court majority. He noted that no constitutional challenge was mounted with respect to the scope of provincial legislative power to regulate newspapers. With regard to The Sun's published statement, reserving to itself the right to edit, classify or refuse an advertisement, his comments were brief but telling :

> I would only add in concluding that I do not think a newspaper, or any other institution or business providing a service to the public, can insulate itself from human rights legislation by relying upon "honest" bias, or upon a statement of policy which reserves to the proprietor the right to decide whom he shall serve.[43]

III. Analysis of the Supreme Court decisions

The failure of the majority opinion to address the fundamental issues posed by the case is of great significance, due to its potential impact on future judgments dealing with provincial human rights statutes. Certain major procedural errors made by the majority must be considered.

First, it is a curious feature of Martland J.'s majority judgment that his reasoning focusses on issues that were summarily dismissed in the dissenting opinions of the Chief Justice and Mr Justice Dickson. Provincial competence over the newspaper business, a subject alluded to and developed by the majority, was not considered by the dissenting justices, due to the lack

[43] *Supra,* note 2, 473.

of proper notice to the Attorneys-General of B.C. and Canada. In fact, during the hearing before the Court, no specific challenge was made by The Sun against the validity or operability of the *Code* with respect to the press.

Secondly, the argument on appeal centered, as it did before the B.C. Courts, on the third question in the stated case — that of reasonable cause. The Sun did not pursue in any of the courts its submission that the service or facility it provided did not fall within the scope of s. 3. In fact, it seems that even the B.C. Court of Appeal was unsure whether the argument could be made at all.[44]

Finally, The Sun's submission that the *Code* proscribed discrimination against the personal attributes of the member of the public seeking the service, and not against the idea that member espouses, was one raised for the first time before the Supreme Court.

It will be seen at once that Martland J. anchored his opinion on all three elements. The Sun did not refuse access to G.A.T.E. on the basis of the personal characteristics of its chairperson, but because of the content of the advertisement G.A.T.E. wished to place. The Sun did not allow the public unrestricted access to its advertising section ; the service or facility it was providing carried with it a reservation of its rights to revise, edit or refuse the advertisement. And finally, The Sun's right to revise, edit or refuse had something of a constitutional basis.

Yet we might question the propriety of the majority in reaching these conclusions. No procedure had been effected to invite comment by the Attorney-General of B.C. on the applicability of s. 3 of the *Code* to newspapers. For Laskin C.J.C., this absence was fatal. Nonetheless, the majority saw fit to discuss the issue, although it had not been explored at the hearing, let alone before any of the B.C. courts. Furthermore, there is good authority for the proposition that the question whether a given set of facts can be embraced by the words of a statute, is not to be considered a question of law.[45] The Sun's first question in the stated case, on the applicability of s. 3 (1) to its advertising columns, could not then engage consideration by a court of law ; s. 18 (a) of the *Code* rules out any attack except on questions of law alone. Whether or not The Sun's advertising service was offered to the

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[44] *Re Vancouver Sun and Gay Alliance Towards Equality, supra,* note 25, 495 *per* Branca J.A. and 499 *per* Robertson J.A.

[45] In *R.* v. *Parkway Chrysler Plymouth Ltd* (1976) 28 C.P.R. (2d) 15 (Ont. C.A.), the Court reaffirmed the well-known distinction that while the construction of the words of a statute raises a question of law, whether the particular matter or thing is of such a nature or kind as to fall within the legal definition is a question of fact. The Court cited as authorities *Re McIntyre Porcupines Mines Ltd and Morgan* (1921) 49 O.L.R. 214 (Ont. S.C., App. Div.) ; *Elliott* v. *South Devon Rwy Co.* (1848) 154 E.R. 682 (Ex.) ; *Attorney-General for Dominion of Canada* v. *Ritchie Contracting and Supply Co.* [1919] A.C. 999 (P.C.) ; *Ciglen* v. *The Queen* [1970] S.C.R. 804.

public on a truncated basis was not a question the Supreme Court was permitted to answer, since its jurisdiction is limited to interpreting pure questions of law.

Finally, one might question the willingness of the majority to consider these issues, which were not pursued in any of the tribunals below. A recent decision of the Ontario Court of Appeal, *Shaver Hospital for Chest Diseases* v. *Slesar,*[46] held that a court of appeal should not entertain an issue which had been neither pleaded, nor developed, nor pursued at trial. This is based on considerations of fairness to the other party:

> It would be manifestly unfair to the respondent to allow the appellant to argue a point which was not raised at the trial at a time when relevant evidence bearing on it could have been introduced.[47]

It is not difficult to understand why the dissenting opinions attend to issues left unspoken by the majority. The reasoning of Martland J. is based solely on arguments neither raised, nor pursued in any of the judgments *a quo.* This practice would seem to be at variance with actual procedures of appellate courts, and contrary to the practice of the Supreme Court itself.[48]

The majority judgment can also be criticized for its handling of the substantive legal issues raised by the appeal.

For example, Martland J.'s discussions of the freedom of the press will confuse most Court observers. The majority was willing to treat the matter as if the *Canadian Bill of Rights* with its specific inclusion of the freedom of the press within its catalogue of protected freedoms, applied to the B.C. *Human Rights Code.* An almost identical majority had, however, declared a year earlier in *Attorney-General of Canada and Dupond* v. *Montréal* that the federal *Bill of Rights* did not apply to provincial statutes.[49] The *Dupond* Court also declared that the fundamental freedoms, including the freedom of the press, were a matter over which the federal and provincial powers had concurrent jurisdiction.[50] Yet Martland J. said in *GATE,* with the concurrence of nearly the same justices who formed the majority in *Dupond,* that "provincial legislation to compel... publication may be unconstitutional".[51] The minority judgments of the Court in the *Alberta Press* case were

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[46] (1979) 27 O.R. (2d) 383. See, in particular, the case law reviewed at p. 386 *et seq.*

[47] *Ibid.,* 389.

[48] It is interesting to note that in *Attorney-General of Canada and Dupond* v. *Ville de Montréal* [1978] 2 S.C.R. 770 [hereinafter *Dupond*], the Appellant Claire Dupond made submissions in her factum which were not made in her oral argument. Beetz J. consequently dismissed them in the following unequivocal terms at p. 789: "Since they were not argued in this Court nor discussed by the Courts below, I will refrain from commenting upon them."

[49] *Ibid.,* 798.

[50] *Ibid.,* 796-7.

[51] *Supra,* note 2, 455. In *Dupond, supra,* note 48, 798, Beetz J. correctly stated the law as follows: "The *Canadian Bill of Rights...* does not apply to provincial and municipal legislation." See also Maloney, *The Supreme Court of Canada and Civil Liberties* (1975-76) 18 Crim. L.Q. 202.

the only authority cited for this surprising statement. Examination of the opinions of Duff C.J.C., Cannon and Davis JJ. in that case do not support the sweeping claims of the majority in *GATE*. On the contrary, the judgment in that case shows that the minority was concerned with legislation of a rather different order. The Alberta statute contemplated mandatory publication, at the instance of the provincial government, of a statement which would be a correction or amplification of any prior statement printed by the newspaper relating to government policy or activity. Further, the newspaper editor could be forced to divulge any source of information upon which the statement appearing in his newspaper was based.

It was in the context of this legislation that Chief Justice Duff could say:

> Some degree of regulation of newspapers everybody would concede to the provinces. Indeed, there is a very wide field in which the provinces undoubtedly are invested with legislative authority over newspapers; but the limit, in our opinion, is reached when the legislation effects such a curtailment of the exercise of the right of public discussion as substantially to interfere with the working of the parliamentary institutions of Canada as contemplated by the provisions of *The British North America Act* and the statutes of the Dominion of Canada.[52]

Little imagination is required to see that the Alberta statute imperilling fundamental freedoms, and a human rights code anchoring the same freedoms, ought to trigger very different legal responses. Even within the concurring opinion in the *Alberta Press* case we see affirmed, as a matter of course, some degree of provincial regulation over the newspaper business.

Perhaps it was because of the inherent frailty of this Supreme Court precedent that the *GATE* majority felt obliged to turn to its American counterpart for support. Yet *Miami Herald Publishing Co.* v. *Tornillo*[53] cannot be used for the purposes assigned to it by Martland J. The Florida statute sought to interfere with editorial control and policy; it was on this ground that the United States Supreme Court held the provision to be unconstitutional. But the decision does not deal with the newspaper's advertising service. As the concurring reasons of White J. reveal, the statute offended the First Amendment because the state

> may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor... [W]e have never thought that the First Amendment permitted public officials to dictate to the press the contents of its news columns or the slant of its editorials.[54]

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[52] *Alberta Press, supra,* note 32, 134-5.

[53] *Supra,* note 31.

[54] *Ibid.,* 261. Subsequent lower court decisions have split on the question of the applicability of *Miami Herald* to advertising. See *Fitzgerald* v. *National Rifle Assoc. of America* 383 F. Supp. 162, 166 (D. D.N.J. 1974); *Gore Newspapers Co.* v. *Shevin* 397 F. Supp. 1253, 1257 (D. S.D.Fla. 1975); *Person and Thee* v. *New York Post Corp.* 427 F. Supp. 1297 (D. E.D.N.Y. 1977) (advertising protected); *New York Times Co.* v. *City of N.Y. Commission on Human Rights* 362 N.Y.S. 2d 321 (Sup. Ct 1974), *aff'd* 374 N.Y.S. 2d 9

The carefully wrought distinction made by Dickson J. between editorial control and advertising services seems to silence effectively the majority's complaint that the *Code* interferes with free public debate and press freedom. The Supreme Court should not have allowed The Sun this constitutional shelter without making a greater effort to justify the basis of this right.

The significance of this new-found constitutional guarantee is unclear. The Court might be saying that newspapers are constitutionally immune to provincial human rights legislation. Should this be so, it cannot be reconciled with the *ratio* in *Dupond.* The Majority's inability to face the constitutional dilemma posed by its assumption that press freedom is a protected right creates serious analytical problems. One should like to know how, on sound legal principles, the Supreme Court may deny provincial competence over fundamental freedoms in this instance, when it was quite willing to validate provincial competence to control civil liberties a year earlier.

The same uncertainty surrounds the majority's apparent willingness to affirm freedom of the press to control what it publishes, when it is remembered that six months prior to its decision in *GATE* the same Court majority (with the addition of Laskin C.J.C.) handed down a decision which seems at first glance contrary to such press freedom. In *Cherneskey* v. *Armadale Publishers Ltd*[55] the Court held that in a libel suit, the defence of "fair comment" is not available to the newspaper publisher who prints a letter in his "Letters to the Editor" column unless he can prove the letter is his honest expression of the matters contained therein.

Mr Justice Dickson, who wrote the dissenting opinion (concurred in by Spence and Estey JJ.), was quick to see the danger to press freedom in the majority stance:

> Newspapers will not to be able to provide a forum for dissemination of ideas if they are limited to publishing opinions with which they agree. If editors are faced with the choice of publishing only those letters which espouse their own particular ideology, or being without defence if sued for defamation, democratic dialogue will be stifled. Healthy debate will likely be replaced by monotonous repetition of majoritarian ideas and

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(App. Div. 1975) (advertising not protected); *Mississippi Gay Alliance* v. *Goudelock* 536 F. 2d 1073 (5th Cir. 1976), *certiorari* denied 430 U.S. 982 (1976); *North Jersey Suburbanite Co.* v. *New Jersey* 381 A. 2d 34 (Super. Ct App. Div. N.J. 1979) (advertising protected); *Triangle Publications Inc.* v. *Knight-Ridder Newspapers Inc.* 445 F. Supp. 875 (D.S.D. Fla. 1978) (protected); *Newspaper Printing Corp.* v. *Galbreath* 580 S.W. 2d 777 (Tenn. Sup. Ct 1979) (protected); *Wisconsin Association of Nursing Homes Inc.* v. *Journal Co.* 285 N.W. 2d 891 (Wis. Ct. App. 1979) (protected); *Allston* v. *Lewis* 480 F. Supp. 328 (D. D.S.C. 1979) (protected); *Quinn* v. *Aetna Life and Casualty Co.* 616 F.2d 38 (2d Cir. 1980) (protected), *aff'g* 482 F. Supp. 22 (D.E.D.N.Y. 1979); *Bates* v. *State Bar of Arizona* 433 U.S. 360 (1977) (protected).

[55] [1979] 1 S.C.R. 1067. See also *Vander Zalm* v. *Times Publishers* (1980) 109 D.L.R. (3d) 531 (B.C.C.A.).

> conformity to accepted taste. In one-newspaper towns, of which there are many, competing ideas will no longer gain access. Readers will be exposed to a single political, economic and social point of view. In a public controversy, the tendency will be to suppress those letters with which the editor is not in agreement. This runs directly counter to the increasing tendency of North American newspapers generally to become less devoted to the publishers' opinions and to print without fear or favour, the widest possible range of opinions on matters of public interest. The integrity of a newspaper rests not on the publication of letters with which it is in agreement, but rather on the publication of letters expressing ideas to which it is violently opposed.[56]

This decision has been criticized by the media and legal scholars. M. R. Doody had termed *Cherneskey* "an unfortunate precedent in our libel laws" in a case comment.[57] The consequences of the decision will inevitably entail an unwillingness on the part of the newspaper publishers to print anything in the "Letters to the Editor" column with which they do not themselves agree. Certain letters which would have been published before *Cherneskey* will now be rejected for fear of libel prosecution. It is difficult to understand how the same Court that was so anxious to preserve free public discussion on matters of public interest in *GATE* would also restrict vigorous public discussion and debate in a "Letters to the Editor" column of a newspaper.

Several issues considered by the Court in its treatment of the B.C. *Code* call for discussion. Three may be singled out: (1) the discussion of the meaning of "accommodation, service or facility customarily available to the public" found in s. 3 (1) of the *Code;* (2) the distinction between discrimination based on personal attributes and discrimination based on ideas; and (3) the notion of reasonable cause.

Martland J. did not accept The Sun's submission that a newspaper-advertising service is not a service customarily available to the public. The learned justice did, however, affirm that since The Sun had reserved the right to revise, edit or reject any classified advertising tendered to it, and had published this daily at the head of its section, the service available to the public was in fact subject to The Sun's discretion. Justification for this conclusion can be gleaned from the *Code* in that s. 3 (1) deals with what is *customarily* offered to the public. But there is an obvious danger in permitting anyone who provides a service to the public to remove him or herself from the ambit of a human rights code. This feature of the majority judgment will likely have an important effect on future judicial responses to human rights legislation: the words "accommodation, service, or facility customarily available to the public" are found, more or less, in every

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[56] *Ibid.*, 1097.

[57] Doody, *Comment* (1980) 58 Can. Bar Rev. 174. See also the observations of Bale, *Casting Off the Mooring Ropes of Binding Precedent* (1980) 58 Can. Bar Rev. 255, 261 *et seq.*

provincial human rights statute dealing with discrimination.[58] While the B.C. *Code* is unique in its open-ended treatment of certain discriminatory practices, tempered only by notion of "reasonable cause", this singular feature dealt with by Dickson J. in dissent was not one which attracted the majority. Instead, by unduly emphasizing that the word "customarily" in the statute refers to the way the particular public service has interpreted its dealings with the public, the Court created a dangerous loophole for anyone seeking to evade the constraints of the *Code.*

It does not appear that such a reading of the statute was in fact mandated by the circumstances of the case. The Sun represented to the Board of Inquiry that its refusal of G.A.T.E.'s advertisement was dictated by standards of public decency and good taste. Yet on the day the Gay Tide advertisement would have appeared had it been accepted for publication, The Sun printed several advertisements dealing with pornographic films, along with warnings from the B.C. Film Classification Director indicating that, in one case, a film contained scenes of "group sex & lesbianism", that another was "completely concerned with sex", and another was described as an "orgy of sex and violence" complete with "male nudity & sex".[59] No one at the Board hearing, however, questioned the propriety of the advertisement which G.A.T.E. tendered.[60] It may be doubted whether The Sun should have been heard to invoke its advertising policy, faced with its practice of accepting advertisements of dubious "decency" and "good taste".[61]

One may reply that this does not squarely attack the logic of Mr Justice Martland's position. Whether or not The Sun generally met the same standards of "public decency" and "good taste" on the basis of which it rejected the Gay Tide advertisement is not at issue. The question is whether the B.C. Legislature, in using the word "customarily", was not in fact directing the courts and the Board to determine in each case the actual practice of the business or enterprise which offers the public its services, facilities or accommodations. As the majority judgment pointed out, The Sun *reserved* itself a right which is decided in this particular case to exercise,

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[58] Alberta: *The Individual's Rights Protection Act,* S.A. 1972, c. 2, s. 3; am. 1980, c. 27, s. 2; British Columbia: *Human Rights Code,* R.S.B.C. 1979, c. 186, s. 3; Manitoba: *The Human Rights Act,* S.M. 1974, c. 65, s. 3; am. 1976, c. 48, s. 3; am. 1977, c. 46, s. 2; New Brunswick: *Human Rights Act,* R.S.N.B. 1973, c. H-11, s. 5; am. 1976, c. 31, s. 2; Newfoundland: *Newfoundland Human Rights Code,* R.S.N. 1970, c. 262, s. 7; *The Ontario Human Rights Code,* R.S.O. 1970, c. 318, s. 2; Prince Edward Island: *Human Rights Act,* S.P.E.I. 1975, c. 72, s. 2; Québec: *Charter of Human Rights and Freedoms,* L.R.Q., c. C-12, s. 12; Saskatchewan: *Saskatchewan Human Rights Code,* S.S. 1979, c. S-24.1, ss. 12, 15; Northwest Territories: *Fair Practices Ordinance,* R.O.N.W.T. 1974, c. F-2, s. 4.

[59] See Joint Record (*GATE*), 78, 119, 123.

[60] *Ibid.,* 166.

[61] Laskin C.J.C. said as much in his dissent. *Supra,* note 2, 448.

"on the controversial subject of homosexuality".[62] This service could not then, in any absolute sense, be considered "customarily" accessible to the public.

American courts, in confronting this problem, have developed an "open door" doctrine which originated in applying anti-discrimination provisions to normally private institutions, clubs and enterprises. Once such a private establishment has opened its doors to the public, the argument runs, it cannot discriminate as to which members of the public shall be allowed in. This doctrine was invoked in establishing the right of Norman Rockwell Jr's National Socialist Party to use a school hall for the purpose of holding a rally.[63]

Such a doctrine may be readily extended to factual situations involved in s. 3 (1) litigation. Although The Sun had published a reservation of its right to revise, edit or refuse all advertisements submitted to it, the newspaper had "opened its doors" to advertisements of films depicting, *inter alia,* "group sex & lesbianism" and "male nudity & sex". It should not have been allowed to fall back on its classified advertisement policy to discriminate in this case since "customary" practice belied its stated policy.

Again it may be objected that Mr Justice Martland's reasoning focussed as much on The Sun's reservation of rights as on the content of the advertisement itself. The newspaper submitted before the Court that G.A.T.E. had not been subject to discrimination on the basis of the characteristics of the organization or of its members. The purpose of s. 3 of the *Code,* as The Sun saw it, is to prevent discrimination levelled at a person or class of persons; it should not be used to prevent every unreasonable denial or discrimination, especially discrimination against ideas. This argument was severely criticized by the Chief Justice (here followed by Mr Justice Dickson) but the majority apparently used it as a major factor in its decision. For Mr Justice Martland, the *Code* ensures that where a service is offered to the public, all sections of the public must be allowed access to it. The nature and scope of that service, however, fall outside the scope of the *Code.* It was in this sense that the learned justice could say that the B.C. "Board erred in law in considering that s. 3 was applicable in the *circumstances* of this case."[64]

A dangerous fallacy resides in this position as well. As the Board noted,

> [i]n so far as the policy of the Respondent is directed against advertisements dealing with homosexuals and homosexuality that policy has resulted in a denial of a service or

[62] *Ibid.,* 455-6.

[63] See *National Socialist White People's Party* v. *Ringers* 473 F. 2d 1010 (4th Cir. 1973). See also *Buckley* v. *Meng* 230 N.Y.S. 2d 924 (Sup. Ct 1962); *ACLU* v. *Bd of Education of Los Angeles* 94 A.L.R. 2d 1259 (Cal. Sup. Ct 1961); *Danskin* v. *San Diego Unified School District* 171 P. 2d 885 (Cal. Sup. Ct 1946).

[64] *Supra,* note 2, 456 [emphasis added].

> facility customarily made available to the public. The "content" of the advertising is but a reflection of the subject matter of the paper in question which, in turn, is merely a reflection of the common purpose of the association. That common purpose, as has already been stated, is indistinguishable from the common bond of the class of persons who constitute the association.[65]

It is an easy step from discrimination against a person on the basis of his or her ideas to discrimination against his or her personal characteristics, or attributes, especially where the ideas are bound up with the attributes of the person. It is difficult to say with any assurance where discrimination against the ideas advocated by a cultural or nationalist group shades off into discrimination against that culture or nation. It seems far better to say, with Chief Justice Laskin, that the *Code* provides us with the proper test (outside the matters covered by s. 3 (2)), *i.e.,* has "reasonable cause" afforded the person allegedly violating the *Code* with "transcending grounds" for adopting his discriminatory stance?[66] The majority opinion, on the contrary, deflects the inquiry into the alleged discrimination onto another track, *i.e.,* whether the denial or discrimination centres on the nature and scope of the service offered. The Court had thus drastically restricted the ambit of the *Code,* merely to ensure that an accommodation, service or facility has been offered to the public at large. That their nature and scope is subject to the ideological whims of the person making them available, is a situation which the *Code* is powerless to overcome.

One commentator has postulated that one of the strengths of the majority opinion in *GATE* is that it lays to rest the curious analysis of "reasonable cause" practised by the majority of the B.C. Court of Appeal.[67] All the Supreme Court justices, it is claimed, were quick to see the disturbing implications of a decision that would confine reasonable cause to an apprehension of economic loss (*per* Robertson J.A.), or, worse, to bias honestly entertained, unless bad faith co-existed (*per* Branca J.A.). Yet absolutely no discussion of reasonable cause occurs in the reasons of the

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[65] Joint Record (*GATE*), 161.

[66] *Supra,* note 2, 447. In fact, as Professor W. Black points out, if the *Code* is read as implying that "reasonable cause" is limited to denials based on personal characteristics, then "[o]ne could exclude blind people, for example, by forbidding the entry of guide dogs or even the use of white canes, for even the most unreasonable prohibition would fall outside the *Code* if it were not in terms of a personal characteristic. Women and religious minorities could often be excluded by means of dress requirements. Indeed, with a little ingenuity, almost any group could be excluded on some basis other than a personal characteristic." Black, *Comment* (1979) 17 Osgoode Hall L.J. 649, 652. See also Proulx, *infra,* note 90, 491 *et seq.* For further more recent discussion of *GATE* by human rights tribunals, see *Black United Front* v. *Bramhill* (1980) 2 Can. Human Rights Reporter D/249, D/251 (N.S. Bd of Inquiry); *Jorgensen* v. *B.C. Ice Cold Storage* (1980) 2 Can. Human Rights Reporter D/289, D/292 *et seq.* (B.C. Bd of Inquiry); *Bailey* v. *Minister of National Revenue* (1980) 1 Can. Human Rights Reporter D/193, D/241 *et seq.* (Can. Human Rights Tribunal).

[67] MacPherson, *Developments in Constitutional Law: The 1978-79 Term* (1980) 1 Supreme Court L.R. 77, 124.

majority in *GATE.* It would have been open to the Court to declare that (1) a newspaper's freedom to control what it publishes is a right deserving protection; (2) in exercising its policy against publishing anything advocating homosexuality, it was merely exercising a publicly-stated prerogative; and (3) to attempt to curtail this prerogative would not advance freedom of expression,which is not a "reasonable" result desired by the *Code.*

The majority ruled, however, that s. 3 had *no application* to the facts at hand. This can only mean that "reasonable cause", a component part of s. 3, also had no bearing on the question. Thus the meaning of this crucial phrase remains uncertain and lower courts will not have the guidance of an authoritative interpretation by the Court. *Dicta* to the effect that "reasonable cause" is something to be measured against the fact presented by each particular case, that the test is necessarily objective, and that honest bias or apprehension of loss of business is not enough, do appear in the dissenting opinions. The majority of the Supreme Court unfortunately took another route in dismissing G.A.T.E.'s appeal, and, in so doing, it created a great deal of confusion concerning the applicability of the *Code* to public services in general and to the newspapers in particular.

IV. In the Wake of *GATE*

It is still too early to determine what the real effect of the *GATE* decision on the lower courts will be. One commentator seems fairly sure that the opinion will be considered as a "cas d'espèce" and will not have too much of an effect even with respect to the interpretation of the B.C. *Code.*[68] While this would be rather reassuring, recent case law does reveal that the reasoning of the Supreme Court majority is being followed.

In *Rocca Group Ltd* v. *Muise,*[69] a recent decision of the Prince Edward Island Supreme Court *in banco,* an appeal was taken from a decision affirming that a term in a lease did not contravene s. 1(1)(d) of the province's *Human Rights Act.*[70] The appellant tenant had entered into a commercial lease with the respondent shopping mall owner. The tenant agreed, pursuant to a clause of the lease, that he would use the premises only as a men's hairstyling salon and barbershop. Other premises in the mall were let to a women's hair salon, whose owner had accepted the exclusivity

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[68] Black, *supra,* note 66, 649.

[69] (1979) 22 Nfld. & P.E.I.R. 1 (P.E.I.S.C.), 102 D.L.R. (3d) 529 *per* Peake, MacDonald and Campbell JJ. [hereinafter cited to D.L.R.]. Motion for leave to appeal to the Supreme Court of Canada dismissed on 20 November 1979, *per* Ritchie, Dickson and Beetz JJ. (1980) 30 N.R. 613.

[70] *Human Rights Act,* S.P.E.I. 1975, c. 72. Para. 1(1)(d) reads as follows: "'discrimination' means discrimination in relation to the race, religion, creed, color, sex, marital status, ethnic or national origin or political beliefs as registered under s. 24 of the *Election Act,* R.S.P.E.I. 1974, c. E-1."

arrangement. Muise, however, began to cut women's hair also, and the owner of the other salon complained. The landlord began eviction proceedings.[71] The Court was asked to decide whether the *Human Rights Act* rendered the exclusivity clause invalid.

The appellant contended that the trial judge had erred in restricting the meaning of the term "discrimination" to a finding of intent. MacDonald J., for the majority, agreed that "intent" played no role in determining a claim of discrimination. Surprisingly, the learned justice relied in part on the dissent in *GATE* as authority:

> That intent to discriminate need not be shown to establish discrimination has been held... recently in the Supreme Court of Canada in *Gay Alliance Toward Equality* v. *Vancouver Sun*... Dickson, J., stated...
>
> > I would only add in concluding that I do not think a newspaper, or any other institution or business providing a service to the public, can insulate itself from human rights legislation by relying upon "honest" bias, or upon a statement of policy which reserves to the proprietor the right to decide whom he shall serve.
>
> While Dickson, J., gave a dissenting judgment the above conclusion, which he reached, was not a matter upon which the majority expressed any opinion.[72]

The judgment went on to hold that "equality of treatment" is the relevant criterion in determining whether discrimination has occured, in cases where "a person... has suffered any adverse consequences or has had some affront to his or her dignity".[73] Reasonableness was singled out as a crucial factor, and since "a reasonable woman" would not consider her dignity lowered if Muise refused to cut her hair, no violation of the *Act* could be said to occur.[74]

The P.E.I. Court referred to two related cases decided in Ontario involving the rights of girls to play on boys' sports teams.[75] The reasoning of the Divisional Court in *Re Cummings and Ontario Minor Hockey Association (OMHA)* and *Re Ontario Rural Softball Association (ORSA) and Bannerman* was approved.[76]

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[71] Pursuant to s. 78 of the *Landlord and Tenant Act*, R.S.P.E.I. 1974, c. L-7.

[72] *Supra*, note 69, 533.

[73] *Ibid.*, 535.

[74] *Ibid.*, 536.

[75] *Re Cummings and Ontario Minor Hockey Association* (1978) 21 O.R. (2d) 389 (Div. Ct), *per* Evans C.J.H.C.; *Re ORSA and Bannerman* (1978) 21 O.R. (2d) 395 (Div. Ct), *per* Evans C.J.H.C. In *Re ORSA* the Divisional Court followed its judgment in *Re Cummings*, which involved an appeal from a deeision of a board of inquiry holding that the Appellant Association was in breach of the *Code* for refusing to permit a girl to play in competitions sponsored by it. The appeal was allowed on the basis that the Association had a right to limit the scope of its activities, and a further appeal to the Ontario Court of Appeal was dismissed on different grounds: (1979) 26 O.R. (2d) 7, (1980) 104 D.L.R. (3d) 434.

[76] In particular, MacDonald J. cited a passage of the Divisional Court judgment in *Re Cummings* where it was concluded that a volunteer organization could legitimately refuse to provide a service beyond the scope of the undertaking. He stated: "I find it hard to distinguish between a volunteer organization, such as the Ontario Minor Hockey Association,

In both cases the Court was called upon to interpret the non-discrimination provision of the *Ontario Human Rights Code,*[77] which was allegedly offended by the policy of the private sports association not to allow integration of the sexes in their organized sports teams. A reading of s. 2 of the *Code* reveals that the legislature emphasized "the place" at which the "accommodations, services, or facilities" were made available.[78] It appears that this is the only provision in Canada which prohibits discrimination with respect to "private" facilities, services or accommodations, when these are made available at a public place. The legislative referent in the Ontario *Code* is therefore the place and not the nature or kind of service made available.[79]

However, the interpretation of Evans C.J.H.C., who wrote the unanimous opinion of the Divisional Court in *Re Cummings and OMHA,* displaced the legislative emphasis on place with a judicial scrutiny of the nature and kind of service or facility made available.[80]

Re ORSA and Bannerman, argued at the same time as *Re Cummings and OMHA,* was appealed to the Ontario Court of Appeal. Weatherston and Houlden JJ.A. wrote separate reasons for refusing the appeal of the Human Rights Commission, and Madame Justice Wilson dissented.[81]

Weatherston J.A. did not adopt the construction placed on the statute by Evans C.J.H.C. in *Re Cummings and OMHA.* The Ontario *Code,* he admitted, directed its target to discrimination carried on in a public place, notwithstanding the private nature of the activity carried on. The learned justice believed, however, that the *Code* ought not to be too literally

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being allowed to put restrictions on its membership and a merchant not being allowed to place the same type of restriction", *supra,* note 69, 538. As we have seen this line of reasoning echoes Martland J. in *GATE.*

[77] R.S.O. 1970, c. 318 (as am.).

[78] Section 2 (1) reads as follows: "No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall, (a) deny to any person or class of persons the accommodation, services or facilities available in any place to which the public is customarily admitted; or (b) discriminate against any person or class of persons with respect to the accommodation, services or facilities available in any place to which the public is customarily admitted, because of the race, creed, colour, sex, marital status, nationality, ancestry or place of origin of such person or class of persons or of any other person or class of persons."

[79] Certain anomalous results would follow if the facts in *GATE* were viewed in the light of s. 2 of the Ontario *Code.* The disposition of the case, for instance, could well have turned on the place where the advertisement was submitted, *i.e.,* at the offices of The Vancouver Sun made open to the public, or by telephone, or by mail sent from the private residence of the applicant. See Black, *supra,* note 66, 651, n. 10 for this illustration. For another critical comment on *GATE* see Gorham, *Comment* (1981) 59 Can. Bar Rev. 165.

[80] *Supra,* note 75, 573.

[81] *Re Ontario Human Rights Commission and Ontario Rural Softball Association* (1979) 26 O.R. (2d) 134 (C.A.), 102 D.L.R. (3d) 303 [hereinafter cited to O.R.], *aff'g Re ORSA and Bannerman, supra,* note 75. Motion for leave to appeal to the Supreme Court of Canada dismissed, 3 December 1979 (1980) 31 N.R. 171.

construed. Despite the *prima facie* violation of the *Code,* Weatherston J.A. cited Martland J.'s proposition in *GATE* that there is no illegal discrimination where the description of the service or facility is so drawn that a group which falls into one of the enumerated classes of proscribed discrimination, cannot by definition be included, or is excluded only incidentally. He gave as an example the case of a boy's choir in which discrimination on the basis of sex occurs as a result of a prior determination not itself tainted by discrimination. The learned justice argued further that if the selection of the person receiving the facility or service is not based on a ground made illegal by the *Code,* no unlawful discrimination is found, regardless of whether some exclusion of the public in fact takes place.

The refusal to permit Debbie Bazso, the girl involved in the appeal, to play on a boys' softball team, could not be termed sexual discrimination. The Ontario Rural Softball Association (O.R.S.A.) had made a prior description of its activities in its constitution, and services were offered to both sexes on a segregated basis. The refusal stemmed from an overall separation of the sexes, on grounds in which sex was "merely" one of the general criteria. The "real reason" for the segregation was "over-all fairness".[82] Mr Justice Weatherston did not, however, clarify the notion of "over-all fairness". If motive is not scrutinized in claims of dicrimination, how is this proposed test to be applied? Clearly, the learned justice would not want to use intention as a yardstick, yet it is difficult to see how his reasoning can stand otherwise.[83]

Mr Justice Houlden would have dismissed the appeal in *Re Cummings and OMHA* on another ground. The Divisional Court's insistence that the relevant services must be those made available to the public was rejected. The Association was not, however, providing "services or facilities" within the meaning of s. 2 (1) (a). It merely set up a play-off schedule for the various leagues affiliated with the organization. It did not otherwise deal with the provision of any other athletic service or facility on the recreational parks where the activities took place.[84]

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[82] *Ibid.,* 321.

[83] Ironically, this reasoning, while it seeks to justify segregated services or facilities, could also lead to an acceptance of "affirmative action" projects; one may discriminate affirmatively if the underlying motive is "over-all fairness", in seeking to redress the imbalance of inequalities produced by discrimination. In *Athabasca Tribal Council* v. *Amoco Canadian Petroleum Co.* (1981) 37 N.R. 336 (S.C.C.), the Supreme Court did not decide the case on the basis of the affirmative action issue, but ruled that the Energy Resources Conservation Board did not have jurisdiction to prescribe the implementation of an affirmation action program. Mr Justice Ritchie said, in *obiter,* that the affirmative action program in question would not be in breach of the *Individual's Rights Protection Act,* S.A. 1972, c. 2, s. 6 (1), 7 (1); am. S.A. 1980, c. 27, s. 11.1 (1).

[84] *Supra,* note 81, 152-5. In apparent disagreement with the belief that human rights legislation should be given a broad interpretation, Houlden J.A. also held that if it was intended to apply the *Code* to activities of groups like the Association, the legislation should do so in "clear and unequivocal language".

Wilson J.A.'s dissenting opinion contains an interesting discussion of the majority judgment in *GATE*. In her view, despite the differences in wording between the B.C. and Ontario statutes, a number of observations in *GATE* have to be considered. For instance, it would be wrong to interpret Martland J. as saying that the categories of accommodations, services and facilities covered by the B.C. section are closed.[85] The Ontario Court was directed to focus on the public nature of the place and not the public nature of services or facilities. Counsel for the Association relied on *GATE* and argued that the Ontario *Code* did not dictate the scope of the service the Association must provide ; the Association itself makes that decision and it cannot be required by the *Code* to provide integrated softball teams. Wilson J.A. rejected the argument and reasoned, in a manner remarkably similar to that of the minority opinions in *GATE,* that :

> The submission, it seems to me, if accepted could also have the effect of defeating the object of the legislation. Is it open to O.R.S.A. to say : "We provide softball for whites and softball for blacks and that is the scope of the service we have decided to provide" ? I do not think so. *I do not believe that the services provided in a public place can be circumscribed on the basis of the prohibited criteria.* Certainly, any organization can determine what services it is going to provide and to whom, but I think what the Legislature is saying in s. 2 is : if you are going to provide them in a place to which the public is customarily admitted, then you cannot exclude anyone from them solely on the basis of race, creed, colour, etc.[86]

There was nothing in s. 2[87] or in the Ontario *Code* in general to warrant a restrictive interpretation of "services or facilities" and thus exclude the services or facilities provided by the Association. The Legislature had made no exception in the *Code* for sports, and it was not appropriate for the courts to do so. Referring to the restrictive interpretation of the Divisional Court the learned justice countered : "the Courts are required to construe the language of the section liberally so as to give effect to the public policy in favour of equality of rights recited in the preamble".[88]

Wilson J.A. thus refused to follow the Divisional Court's reading of s. 2 and adopted a construction which would best accord with its spirit and wording. This element in the Ontario *Code* distinguishes it from s. 3 of the B.C. *Code,* and renders *GATE,* to that extent, inapplicable to Ontario. The recreational services provided by the Association were carried on in public parks and the ban on discrimination contained in the Ontario *Code* thus came into play.

The Supreme Court decision in *GATE* had a definite impact on the reasoning of the Ontario Court of Appeal, despite the different structures of

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[85] *Ibid.,* 310. The passage from Martland J.'s opinion is found in *GATE, supra,* note 2, 455.

[86] *Ibid.,* 311-2 [emphasis added].

[87] *The Ontario Human Rights Code,* R.S.O. 1970, c. 318, s. 2 ; am. 1972, c. 119, s. 3.

[88] *Supra,* note 81, 313-4.

the Ontario and the B.C. *Codes.* Both Weatherston and Wilson JJ.A. were careful not to adopt too readily Martland J.'s argument in *GATE* that the *Code* does not dictate the nature and scope of a public service, facility or accommodation which are offered to the public, but only guarantees that everyone must have access to whatever is offered. Mr Justice Weatherston emphasized that the differentiation in the provision of what is made available must not be made, or must be incidentally made on prohibited grounds. The segregated service offered by O.R.S.A. was justified on broad grounds of "over-all fairness" rather than sex differentiation. Madame Justice Wilson questioned this reasoning on the ground that sexual segregation was a matter falling squarely within the ban on discrimination prescribed by s. 2, regardless of whether exclusion of the sexes was dictated by considerations of differences in physical strength, stamina or physique. Yet the dissenting justice would allow private clubs and associations to deny participation or membership to the public even in a public forum, where the exclusion is made on any ground other than that prohibited by the *Code.* If "sexual orientation" was included in the enumeration of discriminatory grounds found in the Ontario *Code,* the result in *GATE* might well have been different had the refusal of services occurred there.[89]

This is precisely what occurred recently in Québec, which is the only province in Canada to have added the category of "sexual orientation" to its human rights legislation.[90] The only judicial discussion of this amendment to date occurred recently in *Association pour les droits des gai(e)s du Québec (ADGQ)* v. *Commission des Écoles Catholiques de Montréal (CECM).*[91] In

[89] The conclusion that James MacPherson draws regarding the Court of Appeal decisions in *Cummings* and *Bannerman* is that "the effect of the decisions is to deny a large number of girls access to organized athletic programs in Ontario. This result does not flow from judicial decisions saying that the policies of the two associations did not constitute sex discrimination. Rather, the results are based on narrow judical interpretation of other words in the *Code,* in these cases the words 'person' and 'services or facilities...' The narrow judicial interpretation of peripheral wording in the *Code* has precisely the same effect as a judicial declaration that there was no sex discrimination. The girls cannot play." MacPherson, *Sex Discrimination in Canada : Taking Stock at the Start of a New Decade* (1980) 1 Can. Human Rights Reporter C/7, C/11.

[90] *Charter of Rights and Freedoms,* S.Q. 1975, c. 6 ; am. S.Q. 1977, c. 6, s. 1 ; 1978, c. 7. s. 112, now L.R.Q., c. C-12. Section 10 of the *Charter* gives the word "discrimination" the following meaning : "Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, *sexual orientation,* sex, civil status, religion, political convictions, language, ethnic or national origin, social condition or the fact that he is a handicapped person or that he uses any means to palliate his handicap. Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such rights" [emphasis added]. See also Proulx, *Égalité et discrimination dans la Charte des droits et libertés de la personne* [1980] R.D.U.S. 301, 458 *et seq.*

[91] [1980] C.S. 93, (1979) 112 D.L.R. (3d) 230 [hereinafter cited to C.S.]. On appeal to Québec C.A. See Proulx, *supra,* note 90, 541 *et seq.* See also *Ville de Brossard* v. *Commission des droits de la personne* [1980] R.P. 203, on appeal to Québec C.A.

this case Beauregard J. (as he then was) of the Québec Superior Court granted a motion for declaratory judgment[92] following the refusal of the Montréal Catholic School Commission to rent space to the A.D.G.Q., a gay rights group. The group requested the space for a weekend conference when the Commission's students would not normally be attending classes.

The Association's request was initially accepted, but two weeks later the decision was reversed because the Commission "feared the possible repercussions on the education of the C.E.C.M's children".[93] The Association then filed a complaint with the Commission des droits de la personne du Québec (C.D.P.Q.) alleging discrimination on the basis of sexual orientation contrary to ss. 10 and 12 of the *Charter of Human Rights and Freedoms.*

An investigator was assigned to investigate the complaint. He found that the School Commission's refusal to rent its facilities constituted a discriminatory act, in violation of the rights of the freedom of assembly and free expression as guaranteed by the *Charter.* In plenary session, however, the C.D.P.Q. overturned the finding and recognized the legal merits of the School Commission's decision by invoking s. 20, which provides:

> A distinction, exclusion or preference based on the aptitudes or qualifications required in good faith for an employment, or justified by the charitable, philanthropic, *religious,* political or *educational* nature of a non-profit institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory.[94]

The School Commission relied on this provision and argued before the Superior Court that homosexuality is condemned by the Catholic Church; hence the exclusion of the A.D.G.Q. as a lessee was justified by its religious or educational character. The Association was able to prove, on the contrary, that the School Commission drew considerable revenues from renting to the general public, including left-wing, pro-abortion and Muslim groups.

The School Commission cited *GATE* as an authority, but Mr Justice Beauregard carefully distinguished the decision on the grounds that:

> 1. Le texte de loi en cause en Colombie Britannique permettait beaucoup plus de latitude au *Vancouver Sun* que le texte de loi dans la présente affaire ne le permettait à l'intimée;
>
> 2. La cause en Colombie Britannique mettait en jeu le principe de la liberté de presse;
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> 3. La *ratio decidendi* de l'arrêt de la Cour Suprême est que le *Vancouver Sun* offrait ordinairement au public le service d'annonces non pas d'une façon absolue mais sous réserve de son droit de contrôler le contenu des annonces. Or dans la présente cause l'intimée offre au public en général l'usage de ses bâtiments sous réserve de son droit de contrôler la nature des activités conduites dans ses bâtiments mais l'intimée ne s'est

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[92] Pursuant to art. 453 *et seq.* of the C.C.P., L.R.Q., c. C-25.
[93] *Supra,* note 91, 95.
[94] L.R.Q., c. C-12, s. 20.

> jamais réservée le droit de contrôler la nature ou le contenu des discussions que, par ailleurs, elle permet dans ses bâtiments.[95]

The learned justice also made some general comments on the proper interpretation of the exemption clause which merit citation:

> Il faut... souligner que l'article 20 de la Charte est un article d'exemption : il doit donc être interprété restrictivement et la charge de la preuve quant à son application incombe à l'intimée.[96]

Beauregard J. concluded that the School Commission had discriminated on the basis of "sexual orientation" and that in doing so it had violated the *Charter*.

The decision of the Québec Superior Court marks an important step in the field of human rights law.[97] The expansive reading of the anti-discrimination provision coupled with a strict interpretation of the exemption clause of the *Charter* is wholly in keeping with the broad policy concerns of the statute, as manifested in its preamble. Mr Justice Beauregard's able distinguishing of the *GATE* precedent was particularly noteworthy : the School Commission had not reserved the right to control the ideas and policies pursued by the groups to which it leased space, but had only wished to control the nature of activities carried on within school walls. The Commission's rights, then, were no greater than those of any lessor under the Civil Code. It now remains to be seen what will happen to this judgment in the Québec Court of Appeal.

Conclusion

The performance of the Supreme Court of Canada in civil rights cases has not been encouraging. *GATE,* as we have seen, was decided without any serious exploration of the major issues — freedom of the press, discrimination based on sexual orientation, reasonable cause — that had been addressed to the Court. The judgment instead created large gaps in the scope of the B.C. *Human Rights Code.* Newspapers will now be largely exempted from its provision ; reservation of rights declarations by persons providing services or facilities to the public may now allow them to escape

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[95] *Supra,* note 91, 97. *GATE* was recently distinguished in *Re Heerspink and Insurance Corp. of B.C.* (1980) 121, D.L.R. (3d) 464, 470 *et seq.* (B.C.C.A.). Leave to appeal granted to the Supreme Court of Canada, 19 May 1981. See also *Insurance Corp. of B.C.* v. *Heerspink* (1973) 91 D.L.R. (3d) 520, [1978] 6 W.W.R. 702 (B.C.C.A.).

[96] *Ibid.,* 94.

[97] See Bergeron, *New Categories in Quebec Analyzed* (1980) 1 Can. Human Rights Reporter C/17, C/18 and Senay, *Discrimination illicite — Exception au principe —A. 10 et 20* [,] *Charte des droits et libertés* [,] *L.R.Q. c. C-12* (1980) 40 R. du B. 127, 129, where after an analysis of *ADGQ* and *Ville de Brossard* the author concludes as following : "Nous souscrivons entièrement aux positions prises par le juge Beauregard dans l'affaire ADGQ." See also s. 41 of the *Interpretation Act,* L.R.Q., c. I-16.

the ambit of the discrimination prohibitions; discrimination against the ideas or policies espoused by a group may now be considered lawful. The impact of the decision on all other human rights statutes is unavoidable, given the parallel legislation enacted by the other provinces in this field.

In *GATE* the Supreme Court was given a clear opportunity to resolve — for the first time under a provincial human rights statute issues and concerns raised by a minority alleging discrimination. The Court responded by asserting the primacy of other values over civil rights claims. The passage of anti-discrimination statutes in every province of Canada has given the Canadian judiciary the mandate of ensuring that the egalitarian values embodied in this legislation be firmly asserted. One may conclude after reading *GATE* that the Supreme Court has for the moment failed to fulfill this vital task.